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No. 86-1380

Supreme Court, U.S.

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JOSEPH F. SPANIOL, JR.  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1986

ARKANSAS PUBLIC SERVICE COMMISSION; STATE OF  
ARKANSAS; ARKANSAS-MISSOURI CONGRESSIONAL DELEGATION;  
AND MISSOURI PUBLIC SERVICE COMMISSION,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondents.*

**SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT  
OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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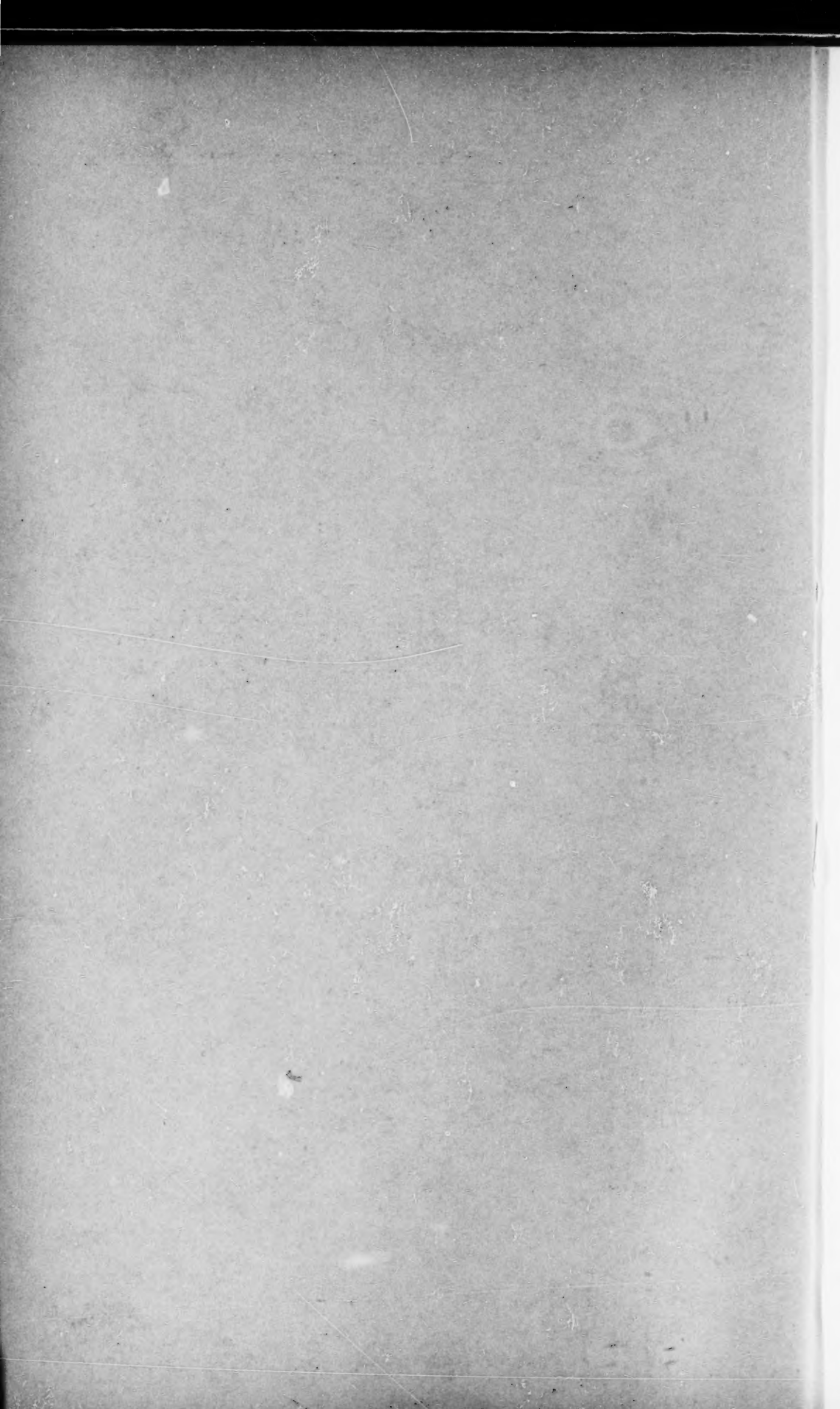
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IN THE  
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No. 86-1380

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ARKANSAS PUBLIC SERVICE COMMISSION;  
STATE OF ARKANSAS;  
ARKANSAS-MISSOURI CONGRESSIONAL DELEGATION; AND  
MISSOURI PUBLIC SERVICE COMMISSION,  
*Petitioners,*

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FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

---

**SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT  
OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

Pursuant to Rule 22.6 of the Supreme Court Rules, the Arkansas Public Service Commission, State of Arkansas, Arkansas-Missouri Congressional Delegation, and Missouri Public Service Commission ("Arkansas-Missouri Parties") file this Supplemental Brief to their Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit ("Arkansas-Missouri Parties' Petition for a Writ of Certiorari"), filed in the instant case on February 20, 1987. This Supplemental Brief is necessary to (1) describe procedural events which occurred subsequent to the filing of the Arkansas-Missouri Parties' Petition

for a Writ of Certiorari; (2) inform the Court that a pending petition for a writ of certiorari raises issues inextricably intertwined with the issues in the instant case;<sup>1</sup> and (3) confirm that the Arkansas-Missouri Parties' Petition for Certiorari was timely filed.

### Procedural Events Subsequent to Filing of Petition

Subsequent to the filing of the Arkansas-Missouri Parties' Petition for Writ of Certiorari, other parties filed petitions for rehearing and suggestions of rehearing *en banc* in the court below. On April 3, 1987, the court below granted rehearing *en banc*.<sup>2</sup> See *Mississippi Industries v. FERC*, 814 F.2d 773 (D.C. Cir. 1987), Supplemental Appendix at SA-1. On June 24, 1987, the court *en banc* vacated its granting of re-

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<sup>1</sup> The Arkansas-Missouri Parties also note that this Court has denied three petitions for writs of certiorari discussed in the Arkansas-Missouri Parties' Petition for a Writ of Certiorari. See Arkansas-Missouri Parties' Petition for Certiorari at 15-18. Therefore, that portion of the Petition is no longer relevant and should be disregarded.

<sup>2</sup> The court below established a briefing schedule, with briefs of petitioners due on May 29, 1987, and briefs of respondents and intervenors due on July 30, 1987. On June 24, 1987, after receiving briefs from petitioners but prior to receiving briefs from respondents and intervenors, the court vacated its order granting rehearing *en banc* and the panel hearing the case granted rehearing and remanded the case to the Federal Energy Regulatory Commission ("FERC"). The Arkansas-Missouri Parties petitioned the court for rehearing and suggested rehearing *en banc* to protest the lack of due process resulting from the court's failure to receive responsive briefs. On September 3, 1987, the court denied the petition for rehearing and the suggestion of rehearing *en banc*. See *Mississippi Industries v. FERC*, \_\_\_ F.2d \_\_\_ (D.C. Cir. Sept. 3, 1987); Supplemental Appendix at SA-7 to SA-10.

hearing. See *Mississippi Industries v. FERC*, 822 F.2d 1103 (D.C. Cir. 1987), Supplemental Appendix at SA-3. At the same time, the panel which heard the case granted rehearing and remanded the case to the FERC. See *Mississippi Industries v. FERC*, 822 F.2d 1104 (D.C. Cir. 1987), Supplemental Appendix at SA-5. The FERC is currently considering comments filed before it on the appropriate treatment of the case. See *Middle South Energy, Inc. and Middle South Services, Inc.*, 40 FERC (CCH) ¶ 61,078 (July 24, 1987).

Despite these subsequent procedural events, the instant case is ripe for this Court's review on the jurisdictional issues raised in the Arkansas-Missouri Parties' Petition for a Writ of Certiorari. If the FERC lacks jurisdiction to reallocate the capacity of the Grand Gulf nuclear power plant, as argued by the Arkansas-Missouri Parties, then the FERC cannot derive an allocation methodology which will comply with the remand order of the court of appeals. Therefore, it is appropriate for this Court to consider the issue of FERC jurisdiction in the instant case at the present time.

**This Case Presents an Issue Which Must Be Decided Prior to a Decision in a Pending Appeal to this Court**

In *Mississippi Power & Light Company v. State of Mississippi*, 506 So. 2d 978 (Miss. 1987), appeal filed, 55 U.S.L.W. 3855 (U.S. June 10, 1987) (No. 86-1970), this Court has been asked to review a decision allowing the Mississippi Public Service Commission to determine certain questions regarding the prudence of the Grand Gulf nuclear power plant. Appellant Mississippi Power & Light Company has claimed in its Jurisdictional Statement that the FERC has exclusive



jurisdiction to make such determinations. If, however, the FERC lacks jurisdiction to reallocate power from the Grand Gulf nuclear power plant, the issues raised in *Mississippi Power & Light Company* are not appropriate for consideration by this Court. Therefore, the threshold issue in *Mississippi Power & Light Company* is the very issue posited in the instant case: Whether the FERC has jurisdiction to reallocate power from the Grand Gulf nuclear power plant. The grant of the Arkansas-Missouri Parties' Petition for a Writ of Certiorari in the instant case and a decision on the jurisdictional issues raised herein would aid in the resolution of the issues in *Mississippi Power & Light Company*.

**The Arkansas-Missouri Parties' Petition for a Writ of  
Certiorari Was Timely Filed**

The Arkansas-Missouri Parties filed their Petition for a Writ of Certiorari forty-five days following the issuance of the opinion and order by the court below. At that time, no petitions for rehearing had been filed with the court below. However, the jurisdictional deadline for filing such petitions had not passed. Therefore, the Arkansas-Missouri Parties' Petition for a Writ of Certiorari was timely filed in accordance with Rule 20.4 of this Court's rules. Subsequent to the filing of the Arkansas-Missouri Parties' Petition for a Writ of Certiorari, other parties filed petitions for rehearing in the court below. The Arkansas-Missouri Parties' Petition for a Writ of Certiorari, which was timely when filed, did not become untimely upon the occurrence of a subsequent event. Rule 20.4 extends the time for filing petitions for writs of certiorari. It does not eliminate consideration of



petitions for writs of certiorari filed soon after a decision by a lower court.<sup>3</sup>

### CONCLUSION

For the foregoing reasons and for the reasons cited in the Arkansas-Missouri Parties' Petition for a Writ of Certiorari, this Court should grant the Petition and consider the questions raised therein.

Respectfully submitted,

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*Attorneys for the Arkansas  
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<sup>3</sup> If the Court determines that the Arkansas-Missouri Parties' Petition for Writ of Certiorari was not timely filed, the Arkansas-Missouri Parties request the Court to permit that untimely filing or to allow the incorporation by reference in this Supplemental Brief of all matters contained in that Petition.

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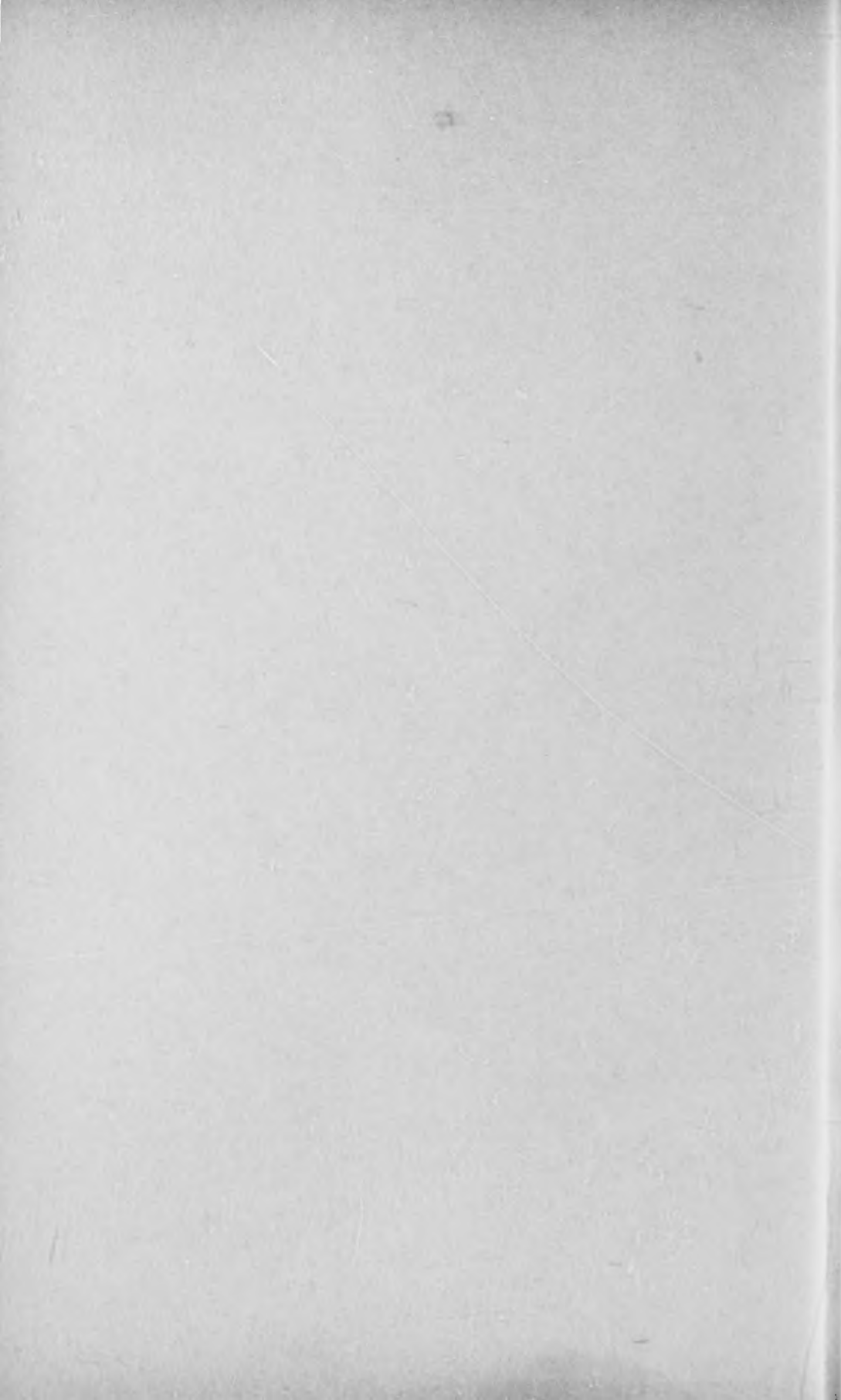
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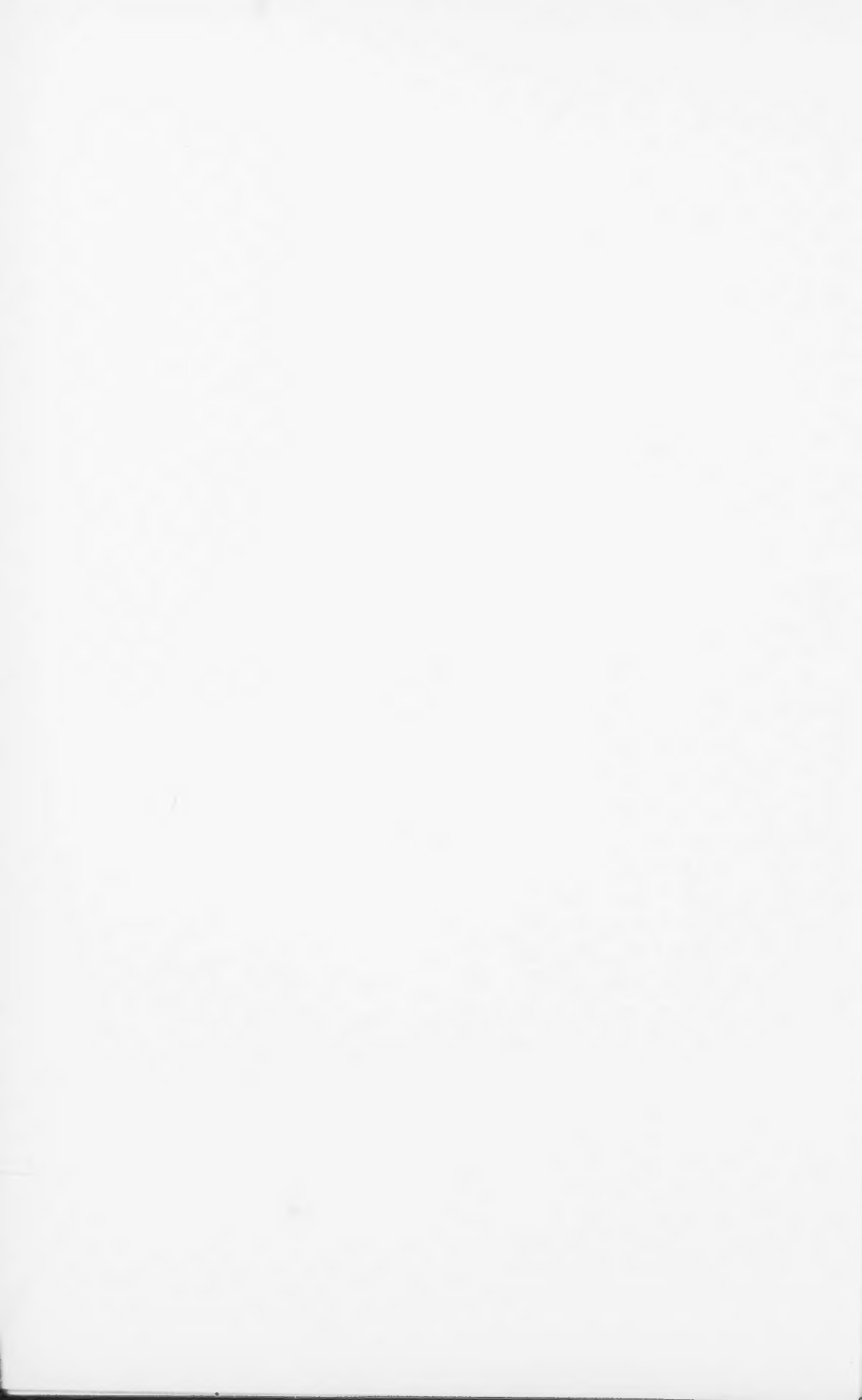
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## **SUPPLEMENTAL APPENDIX**



## SUPPLEMENTAL APPENDIX

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MISSISSIPPI INDUSTRIES

v.

FEDERAL ENERGY REGULATORY COMMISSION.

No. 85-1611, and Consolidated Case Nos. 85-1613,  
85-1615, 85-1616, 85-1617, 85-1618, 85-1619, 85-1620,  
85-1621, 85-1623, 85-1624, 85-1626, 85-1637, 85-1640,  
85-1647, 85-1712, 85-1719 and 85-1772.

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United States Court of Appeals,  
District of Columbia Circuit.

April 3, 1987.

Petitions for Review of Orders of the Federal Energy  
Regulatory Commission.

Prior opinion: 808 F.2d 1525.

Before WALD, Chief Judge; ROBINSON, MIKVA, ED-  
WARDS, RUTH B. GINSBURG, BORK, STARR, SIL-  
BERMAN, BUCKLEY, WILLIAMS and D.H. GINSBURG,  
Circuit Judges.

ORDER

PER CURIAM.

The suggestion for rehearing *en banc* of the City of New Orleans, Louisiana, the suggestion of Mississippi Industries, the Mississippi Attorney General and the Mississippi Public Service Commission, and the suggestion of Mississippi Power and Light Company were circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the suggestions. Upon consideration of the foregoing, it is



ORDERED, by the Court *en banc*, that these cases will be reheard by the Court sitting *en banc*, such rehearing to be limited to the issues raised by the dissenting opinion of January 6, 1987. 808 F.2d 1525 at 1568-69. It is

FURTHER ORDERED, by the Court *en banc*, that those parts of Section III(C)(2) of the opinion of January 6, 1987, 808 F.2d 1525, which address the two issues raised in the dissenting opinion, specifically, pages 1560 to the end of the first paragraph on page 1562, and the judgment of the same date insofar as it concerns those issues, are hereby vacated. It is

FURTHER ORDERED, by the Court *en banc*, that briefs limited to the issues identified in the dissenting opinion of January 6, 1987 shall be filed in accord with the following schedule:

|                                                                                                                    |               |
|--------------------------------------------------------------------------------------------------------------------|---------------|
| Petitioners' briefs (limited to 15 pages). .....                                                                   | May 29, 1987  |
| Brief of respondent (limited to 25 pages) and briefs of supporting intervenors, if any (limited to 10 pages) ..... | July 30, 1987 |

The parties shall submit 30 copies of each brief filed. In light of the length of the briefing schedule, parties on the same side are expected to circulate drafts of their briefs and to file a joint brief, or briefs, or adopt briefs of other parties, wherever possible. The court looks with extreme disfavor upon numerous briefs presenting repetitive arguments.

The parties are further directed to submit 30 additional copies of all briefs previously filed and 15 copies of the joint appendix by May 29, 1987.

The parties will be advised by future order of the date of argument before the *en banc* court. That date will be sometime after commencement of the court's 1987 term, on September 8, 1987.

MISSISSIPPI INDUSTRIES

v.

FEDERAL ENERGY REGULATORY COMMISSION.

Nos. 85-1611, 85-1615 to 85-1621, 85-1623, 85-1624,  
85-1626, 85-1637, 85-1640, 85-1647, 85-1712, 85-1719  
and 85-1772.

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United States Court of Appeals,  
District of Columbia Circuit.

June 24, 1987.

Before WALD, Chief Judge; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D.H. GINSBURG, Circuit Judges.

ORDER

PER CURIAM.

Upon reconsideration of the suggestion for rehearing *en banc* of the City of New Orleans, Louisiana, the suggestion of Mississippi Industries, the Mississippi Attorney General and the Mississippi Public Service Commission, and of the suggestion of Mississippi Power and Light Company, it is

ORDERED by the Court *en banc*, on its own motion, that the suggestions are denied. It is

FURTHER ORDERED by the Court *en banc*, on its own motion, that the Court's order of April 3, 1987, 814 F.2d 773, setting these cases for rehearing by the Court *en banc* is hereby vacated. It is

FURTHER ORDERED by the Court *en banc*, on its own motion, that those parts of Section III(C)(2) of the

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opinion of January 6, 1987, 808 F.2d 1525, which address the two issues raised in the dissenting opinion, specifically, pages 1560 to the end of the first paragraph on page 1563, and the judgment of the same date insofar as it concerns those issues, are hereby reinstated.

MISSISSIPPI INDUSTRIES

v.

FEDERAL ENERGY REGULATORY COMMISSION.

Nos. 85-1611, 85-1613, 85-1615, 85-1616 to 85-1621,  
85-1623, 85-1624, 85-1626, 85-1637, 85-1640, 85-1647,  
85-1712, 85-1719 and 85-1772.

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United States Court of Appeals  
District of Columbia Circuit.

June 24, 1987.

State electric utility system sought approval of agreement allocating costs for nuclear power plant among affiliated operators. The Federal Energy Regulatory Commission reallocated costs, and system petitioned for review. The Court of Appeals, 808 F.2d 1525, affirmed. On panel reconsideration after the Court of Appeals initially granted, 814 F.2d 773, and then denied, \_\_\_ F.2d \_\_\_, rehearing en banc, the Court of Appeals held that, for the reasons stated by Circuit Judge Bork in his dissenting opinion, the case had to be remanded for reconsideration of FERC's decision to equalize the capacity costs of all nuclear plants, and for an explanation of the criteria used to determine what constitutes "undue discrimination."

Prior opinion vacated in part; Commission's decision reversed and remanded.

Before EDWARDS and BORK, Circuit Judges,  
WRIGHT, Senior Circuit Judge.

**ORDER**

**PER CURIAM.**

Upon reconsideration of the petition for rehearing of the City of New Orleans, Louisiana, the petition of Mississippi Industries, the Mississippi Attorney General and the Mississippi Public Service Commission, and of the petition of Mississippi Power and Light Company, it is

ORDERED by the Court, on its own motion, that the order of April 3, 1987, 814 F.2d 773 denying rehearing by the panel is hereby vacated. It is

FURTHER ORDERED by the Court, on its own motion, that the petitions are granted. It is

FURTHER ORDERED by the Court, on its own motion, that, for the reasons stated in the dissenting opinion of January 6, 1987, 808 F.2d 1525 the Commission's decision is reversed and this case is remanded for reconsideration of the decision to equalize the capacity costs of all nuclear plants, and for an explanation of the criteria used to determine what constitutes "undue discrimination" and of why the Commission's ultimate decision is not unduly discriminatory. It is

FURTHER ORDERED by the Court, on its own motion, that those parts of Section III(C)(2) of the opinion of January 6, 1987, which address these two issues, specifically, pages 1560 to the end of the first paragraph on page 1563 and the judgment of the same date insofar as it concerns those issues, are hereby vacated.

SA-7

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 85-1611

---

MISSISSIPPI INDUSTRIES  
v.

FEDERAL ENERGY REGULATORY COMMISSION  
AND CONSOLIDATED CASE NOS. 85-1613,  
85-1615, 85-1616, 85-1618,  
85-1619, 85-1620, 85-1621, 85-1623,  
85-1624, 85-1626, 85-1637, 85-1640,  
85-1647, 85-1712, 85-1719, 85-1772.

UNITED STATES COURT OF APPEALS  
For The District of Columbia Circuit

FILED SEP 03 1987

GEORGE A. FISHER  
CLERK

BEFORE: EDWARDS and BORK, Circuit Judges;  
WRIGHT, Senior Circuit Judge

ORDER

Upon consideration of the petition of the Arkansas Public Service Commission, et al. for rehearing, it is

SA-8

ORDERED, by the Court, that the petition is denied.

*Per Curiam*

FOR THE COURT:  
GEORGE A. FISHER, CLERK

BY: Robert A. Bonner  
Robert A. Bonner  
Deputy Clerk

Circuit Judge Bork did not participate in this order.



SA-9

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 85-1611

---

MISSISSIPPI INDUSTRIES

v.

FEDERAL ENERGY REGULATORY COMMISSION

AND CONSOLIDATED CASE NOS. 85-1613,  
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85-1619, 85-1620, 85-1621, 85-1623  
85-1624, 85-1626, 85-1637, 85-1640  
85-1647, 85-1712, 85-1619, 85-1772.

United States Court of Appeals  
For The District of Columbia Circuit

FILED SEP 03 1987

GEORGE A. FISHER  
CLERK

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards,  
Ruth B. Ginsburg, Bork, Starr, Silberman,  
Buckley, Williams and D. H. Ginsburg, Circuit  
Judges; Wright, Senior Circuit Judge

ORDER

The suggestion for rehearing *en banc* of the Arkansas Public Service Commission, et al. has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

SA-10

ORDERED, by the Court *en banc*, that the suggestion is denied.

*Per Curiam*

FOR THE COURT:  
GEORGE A. FISHER, CLERK

BY: Robert A. Bonner  
Robert A. Bonner  
Deputy Clerk

Circuit Judge Bork did not participate in this order.

